85-1969

No.

Supreme Court, U.S.
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# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1985

THE CITY OF OAKLAND, a charter city
and municipal corporation,
*Petitioner,*

VS.

THE OAKLAND RAIDERS; ALLEN DAVIS;
EDWARD W. MCGAH; LOUIS F. BARROERO;
FRANK IVALDI; SHELDON MILENBACH; JOHN BROOKS;
EUGENE BOSCACCI; JULIUS S. HARTMAN; GLADYS SARGENT;
HENRY TRIONE; RALPH J. VAIL; W. H. WINKENBACH;
E. J. MCGAH; DYNAMIC DEVELOPMENT CO.;
OLIVER HOMES, INC.; ARNOLD BOSCACCI;
ANDREWS CONSTRUCTION CO.; RALPH J. VAIL, Trustee; and
LOS ANGELES MEMORIAL COLISEUM,
*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT

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## QUESTIONS PRESENTED

1. Should the decision in *Garcia v. San Antonio Metropolitan Transit Authority* be extended to prohibit the City of Oakland's effort to acquire a National Football League franchise by the inherent State sovereign power of eminent domain, solely because of the dormant power of Congress under the Commerce Clause?

2. May the City's eminent domain action be precluded by the Commerce Clause even though any burdens on interstate commerce would be caused by City participation in the market, rather than regulation of the market?

3. In any event, may the City's action be barred by the Commerce Clause where the speculative adverse effects of City acquisition on the commerce of the National Football League would be indirect and insubstantial?

## TABLE OF CONTENTS


| | Page |
|---|---|
| Questions presented | i |
| Table of contents | ii |
| Table of authorities | iii |
| Opinion below | 2 |
| Jurisdictional statement | 2 |
| Constitutional provisions involved | 2 |
| Statement of the case | 2 |
| Reasons for granting the writ | 4 |
| Argument | 8 |
| I | |
| The lower court decision should be reversed because it authorizes the judiciary to abrogate state sovereign powers of eminent domain solely on dormant commerce clause grounds, contrary to *Hayfield Northern Railroad*, and without the minimum federal political protection of Tenth Amendment rights required by *Garcia v. San Antonio Metropolitan Transit Authority* | 8 |
| II | |
| The lower court decision conflicts with this Court's decision in *White v. Massachusetts Council of Construction Employers, Inc.*, because the supposed burdens on interstate commerce arising out of the City's acquisition of the Raiders' NFL franchise would be the result of City participation in the market, not regulation of the market | 11 |
| III | |
| Even if the City's potential actions following acquisition of the Raiders' NFL franchise were determined to be burdens on interstate commerce, they would be indirect and insubstantial, and not undue burdens prohibited by the Commerce Clause | 14 |
| Conclusion | 19 |
| Appendix A—Opinion of the Court of Appeal of the State of California | 1a |
| Appendix B—Order of the Supreme Court of California Denying Petition for Review | 9a |

## TABLE OF AUTHORITIES

### Cases

Page

American Railway Express Co. v. Levee, 263 U.S. 19 (1923) ..... 2
Berman v. Parker, 348 U.S. 26 (1954) ..... 7, 13
Chicago, R.I. & G. Ry. Co. v. Tarrant County Water Control & Improvement Dist. No. 1 (Tex.Civ.App.) 76 S.W.2d 147 (1934), cert. denied, 295 U.S. 762 (1935) ..... 5, 17, 18
City of Oakland v. Oakland Raiders, 32 Cal.3d 60, 183 Cal.Rptr. 673, 646 P.2d 835 (1982) ..... 3, 7, 13
City of Oakland v. Oakland Raiders, 174 Cal.App.3d 414, 220 Cal.Rptr. 153 (1985) ..... 4
City of Oakland v. Superior Court, 150 Cal.App.3d 267, 197 Cal.Rptr. 729 (1983) ..... 4
Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952) 13
Elberton Southern Railway Co. v. State Highway Dept., 211 Ga. 838, 89 S.E.2d 645 (1955) ..... 5, 16, 17
Erie Railroad Co. v. Board of Public Utility Commissioners, 254 U.S. 394 (1921) ..... 18
Exxon Corporation v. Governor of Maryland, 437 U.S. 117 (1978) ..... 5, 16, 17
Florida Lime & Avocado Growers, Inc. v. Paul 373 U.S. 132 (1963) ..... 11
Garcia v. San Antonio Metropolitan Transit Authority, 105 S.Ct. 1005 (1985) ..... 4, 6, 8, 9, 10, 19
Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984) ..... 7, 9, 13, 14
Hayfield Northern Railroad Co. v. Chicago & North West ern Transportation Co., 467 U.S. 622 (1984) ..... 5, 7, 10, 11
Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976) ..... 11, 12, 14
In re Fifth Avenue Coach Lines, Inc., 18 N.Y.2d 212, 273 N.Y.S.2d 52, 219 N.E.2d 410 (1966) ..... 7
Kohl v. United States, 91 U.S. 367 (1876) ..... 13
Los Angeles Memorial Coliseum Commission v. National Football League, 726 F.2d 1381 (9th Cir.), cert. denied, 105 S.Ct. 397 (1984) ..... 3, 5, 15

## TABLE OF AUTHORITIES

### CASES


Page

Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959) ..... 13
Milwaukee & Suburban Transport Corp. v. Milwaukee County, 82 Wis.2d 420, 263 N.W.2d 503 (1978) ..... 7
National League of Cities v. Usery, 426 U.S. 833 (1976) 9
Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) .....15, 18
Reeves, Inc. v. Stake, 447 U.S. 429 (1980) ....5, 11, 12, 13, 14
South-Central Timber Development, Inc. v. Wunnicke, 467 U.S. 82 (1984) .....5, 11, 12, 13
West River Bridge v. Dix, 47 U.S. (6 How.) 507 (1848) 8
Western Union Telegraph Co. v. Louisville & Nashville Railroad Co., 270 Ill. 399, 110 N.E. 583 (1915) .....5, 17
White v. Massachusetts Council of Construction Employers, Inc., 460 U.S. 204 (1983) .....5, 11, 12, 14
Willson v. Black-bird Creek Marsh Co., 27 U.S. (2 Pet.) 245 (1829) ..... 4


### Constitutional Provisions


Constitution of the United States:
Article I, § 8, cl. 3 ..... *passim*
Article I, § 10 ..... 8

Constitution of the United States, Fifth Amendment ..... 8

Constitution of the United States, Tenth Amendment ...2, 6, 9


### Statutes


28 U.S.C. § 1257(3) ..... 2


### Other Authorities


Eule, *Laying the Dormant Commerce Clause to Rest*, 91 Yale L.J. 425 (1982) ..... 4

1 Nichols on Eminent Domain §§ 1.11, 1.14[2] (3d ed. 1980) ..... 8

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*Respondents*.

## PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT

Petitioner requests that a writ of certiorari issue to review the judgment of the Court of Appeal of California, First Appellate District, entered November 15, 1985, declaring that the dormant power of Congress under the Commerce Clause precludes acquisition by eminent domain of the National Football League franchise and related property of the Oakland Raiders. Petitioner further requests that this Court enter an order of summary reversal. Sup. Ct. R. 23.1.

## OPINION BELOW

The opinion of the Court of Appeal of California, First Appellate District, dated November 15, 1985 (Appendix A, 1a-8a.), is reported at 174 Cal.App.3d 414, 220 Cal.Rptr. 153 (1985). The summary decision of the California Supreme Court not to review the merits of the Court of Appeal opinion, dated February 27, 1986, (Appendix B, at 9a) is not reported.

## JURISDICTIONAL STATEMENT

The opinion of the Court of Appeal of California, First Appellate District, was issued on November 15, 1985. That court denied a petition for rehearing on December 12, 1985. The Supreme Court of California denied a petition for review of the Court of Appeal decision on February 27, 1986.

This petition is filed within ninety days of the date on which the highest state court refused to review the decision. See *American Railway Express Co. v. Levee*, 263 U.S. 19, 20-21 (1923).

This Court's jurisdiction is invoked under 28 United States Code § 1257(3) (1982).

## CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Article I, § 8, cl. 3: "The Congress shall have Power . . . to regulate Commerce . . . among the several States. . . ."

United States Constitution, Amendment X: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

## STATEMENT OF THE CASE

Petitioner City of Oakland ("the City") seeks review of a judgment of the Court of Appeal of California, First Appellate District, affirming the dismissal of the City's eminent domain action to acquire the National Football League franchise and related property of the Oakland Raiders. At stake in this case is

the ability of state and local governments to condemn property, the potential use of which is alleged to conflict with the dormant powers of Congress under the Commerce Clause.

This eminent domain action was brought by the City on February 22, 1980, when the Oakland Raiders National Football League franchise was preparing to move from Oakland, California, to Los Angeles, California. The franchise originated in Oakland in 1960, and provided the impetus for construction of a publicly-financed sports stadium in Oakland in 1966. The franchise enjoyed substantial public and private support from 1960 to 1980 in Oakland, and attracted capacity crowds for thirteen consecutive seasons. This action was commenced so that the City could maintain the public recreation and related public social, psychological, economic, and image-enhancement benefits associated with the presence of the City's preeminent sports franchise.

When this action was dismissed by the summary judgment of the trial court in 1980, the City appealed; the Supreme Court of California reversed the dismissal in 1982 and remanded the case for trial. *City of Oakland v. Oakland Raiders*, 32 Cal.3d 60, 183 Cal.Rptr. 673, 646 P.2d 835 (1982). When, in an unrelated action, the United States District Court (C.D. Cal.) declared the National Football League's franchise transfer rules to be invalid under the Sherman Antitrust Act in 1982, the Raiders' franchise began operations in Los Angeles. See *Los Angeles Memorial Coliseum Commission v. National Football League*, 726 F.2d 1381, 1386 (9th Cir.), cert. denied, 105 S.Ct. 397 (1984).

This eminent domain action went to trial in 1983. The trial court found that the presence of the Raiders in Oakland provides public recreation, that recreation is a need of the public, and that professional football in Oakland provides a significant benefit to the City, in part because the presence of the Raiders "enhances good interracial relations" in Oakland. In addition, the court found that the economy of Oakland would suffer if the franchise were to be removed from the City. 3 C.T. 1474-1476.

Nevertheless the trial court entered judgment in August, 1983, dismissing the action on five independent grounds. That decision

was vacated by the Court of Appeal of California, First Appellate District, and the case was remanded to the trial court for rulings on the remaining issues in the case. *City of Oakland v. Superior Court*, 150 Cal.App.3d 267, 197 Cal.Rptr. 729 (1983).

The trial court then again dismissed the action, concluding, *inter alia*, that the eminent domain action was barred by the dormant Commerce Clause.[1] The Court of Appeal of California, First Appellate District, affirmed the judgment of dismissal, addressing only the question of the impact of the dormant Commerce Clause upon the state's inherent power of eminent domain. *City of Oakland v. Oakland Raiders*, 174 Cal.App.3d 414, 220 Cal.Rptr. 153 (1985); Appendix A. The Supreme Court of California declined to review the decision of the Court of Appeal. Appendix B, at 9a.

The decision of the Court of Appeal of California, which the City asks this Court to review, held that acquisition of the franchise by the City would substantially burden interstate commerce, and that the dormant power of Congress under the Commerce Clause precluded the City's exercise of eminent domain in this case.

## REASONS FOR GRANTING THE WRIT

The California court's decision should be reviewed by this Court because it conflicts in principle with decisions of this Court, with decisions of the highest courts in other states, and with a contemporaneous decision of the Ninth Circuit Court of Appeals which also involves the location of the Raiders' franchise. If not reversed, the California decision will establish an unwarranted extension of this Court's ruling in *Garcia v. San Antonio Metropolitan Transit Authority*, 105 S.Ct. 1005 (1985), because the decision subjects essential attributes of State sovereignty to chal-

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[1] What is "dormant" is the power of Congress to regulate commerce. See *Willson v. Black-bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245, 252 (1829). The phrase "dormant Commerce Clause" has been adopted as a shorthand reference. See Eule, *Laying the Dormant Commerce Clause to Rest*, 91 Yale L.J. 425 n. 1 (1982).

lenge solely because of Congressional inaction under the Commerce Clause. If the lower court decision is not reversed, persons dissatisfied with any local government action will be encouraged to challenge that action on the ground that it might burden a private business interest which is engaged in interstate commerce—even where, as here, that business itself has interposed no objection.

The decision below is contrary to the decision of this Court in *Hayfield Northern Railroad Co. v. Chicago & North Western Transportation Co.*, 467 U.S. 622 (1984), and inconsistent with *Exxon Corporation v. Governor of Maryland*, 437 U.S. 117 (1978). The California court decision also conflicts in principle with this Court's decisions in *White v. Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204 (1983), *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980), and *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82 (1984), because the supposed burdens on commerce identified by the lower court are almost exclusively the result of anticipated actions by the City as a participant in the marketplace.

The California decision also is inconsistent in principle with all other decisions of highest state courts which have considered challenges to state eminent domain actions based on the dormant Commerce Clause. Such challenges have been rejected even when the property sought to be acquired was a portion of an interstate railway. *Elberton Southern Railway Co. v. State Highway Dept.*, 211 Ga. 838, 841, 89 S.E.2d 645, 649-650 (1955); *Western Union Telegraph Co. v. Louisville & Nashville Railroad Co.*, 270 Ill. 399, 415-423, 110 N.E. 583, 589-592 (1915); *Chicago, R.I. & G. Ry. Co. v. Tarrant County Water Control & Improvement Dist. No. 1* (Tex.Civ.App.) 76 S.W.2d 147 (1934), cert. denied, 295 U.S. 762 (1935).

The lower court decision also is in conflict with the principles of law applied by the Ninth Circuit Court of Appeals with respect to the same franchise move from Oakland to Los Angeles, and the same basic issue: the extent to which the Commerce Clause affects the ability of individual NFL franchise owners to determine the location of the franchise. In *Los Angeles Memorial Coliseum Commission v. National Football League*, 726 F.2d

1381 (9th Cir.) cert. denied, 105 S.Ct. 397 (1984), the Ninth Circuit concluded that NFL attempts to keep the Raiders' franchise in Oakland violated antitrust laws enacted by Congress under authority of the Commerce Clause. In this case, the California court has held that the City may not acquire the franchise because the City's desire to locate the franchise in Oakland would offend NFL interests, thereby violating the dormant Commerce Clause. For purposes of resolving the issue of franchise location, the Ninth Circuit treated the NFL member teams as "independent and competitive with one another." 726 F.2d at 1389. However, in its ruling in this case, the California court found that the NFL essentially is a single entity or "joint venture." Appendix 6a. The Ninth Circuit found that Congress intended the public interest in competition among franchise owners to outweigh NFL interests in keeping the franchise in Oakland; the California court found that the Oakland public interest in retaining the franchise was outweighed by the NFL's supposed adverse interest in franchise location. The legal reasoning and results in the Ninth Circuit case and California case cannot be reconciled.

Finally, the California decision implicitly extends this Court's ruling in *Garcia v. San Antonio Metropolitan Transit Authority*, 105 S.Ct. 1005 (1985), into an area which is not warranted by the reasoning of that decision. In *Garcia*, this Court held that comprehensive Congressional legislation in the field of mass transit, enacted pursuant to the authority of the Commerce Clause, overrode inconsistent state determinations of transit employee minimum wage and overtime pay. There, this Court found that the federal political process which resulted in Congressional action was sufficient to protect State sovereign interests from erosion of the guarantees provided by the Tenth Amendment. Here, however, Congress has not acted. No Congressional legislation affecting State eminent domain powers was relied on by the California court below. Eminent domain, an essential and inherent attribute of state sovereignty, should not be defeated by Congressional inaction under the Commerce Clause.

The decision which the City asks this Court to review exposes almost every State eminent domain action to attack upon dor-

mant Commerce Clause grounds. The rationale of the California Court of Appeal could be applied to acquisition of businesses and property in redevelopment areas (*Berman v. Parker*, 348 U.S. 26 (1954)), or municipal bus lines (*In re Fifth Avenue Coach Lines, Inc.*, 18 N.Y.2d 212, 273 N.Y.S.2d 52, 219 N.E.2d 410 (1966); *Milwaukee & Suburban Transport Corp. v. Milwaukee County*, 82 Wis.2d 420, 263 N.W.2d 503 (1978)), or portions of an interstate railway (*Hayfield Northern Railroad Co. v. Chicago & North Western Transportation Co.*, 467 U.S. 622 (1984)), or even land acquired for redistribution to tenants (*Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984)). The power of eminent domain is coterminous with the scope of the local government's police power (*Id.* at 240); it is a means by which the sovereign may provide for the public welfare Therefore, a great many local government activities could be challenged on grounds similar to those relied upon by the State Court of Appeal. That court's decision, if followed, would invalidate local government ownership of sports franchises. Indeed, the universally accepted concept of public ownership of sports stadiums would be subject to attack for the same reasons relied upon by the California court here. See *City of Oakland v. Oakland Raiders*, 32 Cal.3d at 70-72, 183 Cal.Rptr. at 679-681, 646 P.2d at 841-842.

It may be, as stated by the court below, that regulation of sports league franchise relocation "should come from Congress; only then can the consequences to interstate commerce be assessed and a proper balance struck to consider and serve the various interests involved in a uniform manner." Appendix 7a-8a (footnote omitted). But at least until Congress takes such action, States should be free to exercise their sovereign powers in the public interest.

## ARGUMENT

### I

### THE LOWER COURT DECISION SHOULD BE REVERSED BECAUSE IT AUTHORIZES THE JUDICIARY TO ABROGATE STATE SOVEREIGN POWERS OF EMINENT DOMAIN SOLELY ON DORMANT COMMERCE CLAUSE GROUNDS, CONTRARY TO *HAYFIELD NORTHERN RAILROAD*, AND WITHOUT THE MINIMUM FEDERAL POLITICAL PROTECTION OF TENTH AMENDMENT RIGHTS REQUIRED BY *GARCIA V. SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY*

The City's power to acquire the Raiders' NFL franchise by eminent domain should be affirmed in the absence of any inhibiting action by Congress pursuant to the Commerce Clause. Here, Congress has taken no action to interfere with the City's inherent eminent domain power.

This Court held long ago that, "in every political sovereign community there inheres necessarily the right and the duty of guarding its own existence, and of protecting and promoting the interests and welfare of the community at large. . . . This power [is] denominated the *eminent domain*. . . ." *West River Bridge v. Dix*, 47 U.S. (6 How.) 507, 531 (1848). The power of eminent domain has been called an "inherent" attribute of sovereignty, "universally" recognized and "necessary to the very existence of government." 1 Nichols on Eminent Domain §§ 1.11, 1.14[2] (3d ed. 1980). Until the decision of the California Court of Appeal in this case, no eminent domain action has been prohibited by any Constitutional restraint other than those specifically relating to the taking of property found in the Fifth Amendment: due process, public use, and just compensation.

In *West River Bridge*, 47 U.S. (6 How.) at 531, this Court rejected a challange to the State's eminent domain power based on the Contract Clause, Article I, section 10 of the Constitution, concluding as follows:

> The Constitution of the United States, although adopted by the sovereign States of this Union, and proclaimed in its own language to be the Supreme law for their government, can, by no rational interpretation, be brought to conflict with this attribute in the States; there is no express delegation of it by the Constitution; and it would imply an incredible fatuity in the States, to ascribe to them the intention to relinquish the power of self-government and self preservation.

This Court recently affirmed that "the Contract Clause has never been thought to protect against the exercise of the power of eminent domain." *Hawaii Housing Authority v. Midkiff*, 467 U.S. at 243 n. 6. An identical conclusion can and should be reached with respect to the dormant Commerce Clause. If there is a hierarchy of States' rights protected by the Tenth Amendment, the power of eminent domain must be considered to be among the most important. If there is a hierarchy of potential Constitutional restraints on the States' eminent domain powers, claims based on the dormant power of Congress under the Commerce Clause must be considered to be among the least substantial. Even if Congress may strip the City of its eminent domain powers by action taken under the Commerce Clause, no court should imply an intent to prohibit such acquisitions in the absence of considered and direct action by Congress.

In *Garcia v. San Antonio Metropolitan Transit Authority*, 105 S.Ct. 1005, this Court overruled *National League of Cities v. Usery*, 426 U.S. 833 (1976), stating that "the model of democratic decision-making the Court there identified underestimated, in our view, the solicitude of the national political process for the continuing vitality of the States." 105 S.Ct. at 1021. In concluding that a municipal transit system was subject to the Fair Labor Standards Act, this Court noted the extensive involvement of Congress in public mass transit:

> Congress' treatment of public mass transit reinforces our conviction that the national political process systematically protects States from the risk of having their functions in that area handicapped by Commerce Clause regulation.

105 S.Ct. at 1020 (footnote omitted).

In the present case there has been no Congressional "political process" to protect the "continuing vitality" of the states' sovereign eminent domain interests. Instead, the California court has interposed its view of what Congress might have done had it considered the effects of this acquisition upon interstate commerce.

This Court in *Garcia* observed that "we continue to recognize that the States occupy a special and specific position in our constitutional system and that the scope of Congress' authority under the Commerce Clause must reflect that position." *Id.* at 1020. This Court carefully limited its decision in *Garcia* to the facts before it, and noted that those facts "do not require us to identify or define what affirmative limits the constitutional structure might impose on federal action affecting the States under the Commerce Clause." *Ibid.*

This case directly presents a question left open for consideration by *Garcia*: whether the exercise of State eminent domain powers may be prevented by the dormant Commerce Clause. That question must be answered in the negative because of this Court's recent decision in *Hayfield Northern Railroad Co. v. Chicago & North Western Transportation Co.*, 467 U.S. 622 (1984). Even though the issue in *Hayfield* was discussed in terms of the preemption doctrine, and the California court ruling here is based on the dormant Commerce Clause, the basic issue is the same in both cases: the effect upon a state's power of eminent domain of Congressional *inaction* under the Commerce Clause. In *Hayfield*, Minnesota law permitted a state eminent domain action to acquire an abandoned railway line. The railroad argued that the state condemnation action was preempted by the Staggers Rail Act, which was enacted by Congress pursuant to its Commerce Clause powers, and which regulated the process by which rail carriers could abandon unprofitable lines. This Court rejected the railroad's contention in language that is determinative here:

> This Court has repeatedly affirmed . . . that "federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter

> permits no other conclusion, or that the Congress has unmistakably so ordained." *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963). In this case, Congress has *not* "unmistakably ordained" that the States may not exercise their traditional power of eminent domain over railroad property that has been abandoned; nothing in the Act expressly refers to federal pre-emption with respect to the disposition of abandoned railroad property. Nor is there any indication that the subject matter at issue here—abandoned railroad property—is of the sort that "permits no other conclusion" but that it is governed by federal and not state regulation. After all, state law normally governs the condemnation of ordinary [unregulated] real property.

467 U.S. at 632.

Here, Congress has not "unmistakably ordained" that the City's condemnation action be prohibited. Moreover, the *Hayfield* decision upheld state eminent domain power even where, unlike here, Congress extensively regulated the subject of the condemnation under its Commerce Clause power. The decision of the lower court and the decision in *Hayfield* cannot be reconciled.

## II

## THE LOWER COURT DECISION CONFLICTS WITH THIS COURT'S DECISION IN *WHITE V. MASSACHUSETTS COUNCIL OF CONSTRUCTION EMPLOYEES, INC.*, BECAUSE THE SUPPOSED BURDENS ON INTERSTATE COMMERCE ARISING OUT OF THE CITY'S ACQUISITION OF THE RAIDERS' NFL FRANCHISE WOULD BE THE RESULT OF CITY PARTICIPATION IN THE MARKET, NOT REGULATION OF THE MARKET

When a local government acts as a market *participant*, rather than as a market *regulator*, the dormant Commerce Clause places no limitation upon the local government's activities. *White v. Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204 (1983); *Reeves, Inc. v. Stake*, 447 U.S. 429, 436-437 (1980); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 810 (1976). "[W]hen a state or local government enters the market as a

participant it is not subject to the restraints of the Commerce Clause." *White*, 460 U.S. at 208. In this kind of case, there is "a single inquiry: whether the challenged 'program constituted direct state participation in the market.' " *Reeves*, 447 U.S. at 436 n. 7. See: *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 93-95 (1984); *White*, 460 U.S. at 208.

The California Court of Appeal concluded that *White*, *Reeves*, and *Alexandria Scrap* were inapplicable to the City's acquisition of the Raiders' franchise and related property because "the city does not even cross the threshold of the marketplace except by first exercising what has been characterized as a sovereign's 'most awesome grant of power'—eminent domain." Appendix 4a. The lower court's conclusion rested upon its belief that the "commerce clause applies to 'actions taken by states in their sovereign capacity' but does not limit proprietary activity." *Ibid.*

Contrary to the lower court's analysis, this Court in *White*, *Reeves*, and *Alexandria Scrap* made no distinction between the government's "proprietary" and "sovereign" powers in participating in the marketplace. The lower court's sole reference for its distinction between proprietary and sovereign powers is a citation to *Reeves*, 447 U.S. at 437. Appendix 4a. *Reeves* makes no such discrimination, but instead emphasizes the "basic distinction . . . between States as market participants and States as market regulators." 447 U.S. at 436-437. In fact, the decision in *Reeves* is directly opposite to the Court of Appeal's conclusion. This Court held that, once a local government decides to participate in the market, it does so *both* as a sovereign and as a business entity, and it does so outside the scope of the Commerce Clause. "When a State buys or sells, it has the attributes of both a political entity and a private business." 447 U.S. at 439 n. 12.

In *White*, *Reeves*, and, to a lesser extent, *Alexandria Scrap*, this Court considered the historical purpose of the Commerce Clause, concepts of State sovereignty, and marketplace characteristics in reaching its conclusions. The most important consideration is that historically the "Commerce Clause responds principally to state taxes and regulatory measures impeding free private trade in the national market place"; the Commerce Clause was not designed

"to limit the ability of the States themselves to operate freely in the free market." 447 U.S. at 437.

While the "precise contours of the market-participant doctrine have yet to be established" (*South-Central Timber Development, Inc.*, 467 U.S. at 93), where the local government actually participates in the marketplace, and where the market participation involves integral government functions or the exercise of sovereign powers, there should be immunity from even direct Congressional interference under authority of the Commerce Clause. *Reeves*, 447 U.S. at 437-439 (Blackmun, J., majority opinion) and 447 U.S. at 449-450, 451 (Powell, J., joined by Brennan, White, and Stevens, JJ., dissenting opinion).

The right of eminent domain sought to be exercised here is a fundamental and inherent attribute of sovereignty. See generally *Hawaii Housing Authority v. Midkiff*, 467 U.S. at 239-245.

> No one doubts the existence in the state governments of the right of eminent domain—a right distinct from and paramount to the right of ultimate ownership. . . . The right is the offspring of political necessity. . . .

*Kohl v. United States*, 91 U.S. 367, 371 (1876). See also *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 28 (1959) (the exercise of the power of eminent domain is "intimately involved with sovereign perogative").

In this case, the purpose of the eminent domain action is to provide public recreation and the important public benefits related to the retention of the NFL franchise in Oakland. As the Supreme Court of California recognized in its 1982 opinion in this case, such objects are legitimate governmental purposes. *City of Oakland v. Oakland Raiders*, 32 Cal.3d at 70-72, 183 Cal.Rptr. at 679-681, 646 P.2d at 841-842 (surveying state court decisions from California, New Jersey, Pennsylvania, and Ohio). These benefits are part of the package of benefits traditionally provided by local governments through the use of eminent domain. As this Court held in *Berman v. Parker*, 348 U.S. 26, 33 (1954):

> The concept of the public welfare is broad and inclusive. See *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 424. The

> values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.

"[T]he power of eminent domain is merely the means to the end." *Ibid.* See also *Hawaii Housing Authority v. Midkiff*, 467 U.S. at 240. Providing public recreation and its related benefits is a traditional governmental function and exercise of local sovereignty. Whether the benefits are provided by public subsidy of professional sports teams, or by acquisition of the stadium or the franchise itself, should be irrelevant to Commerce Clause considerations. The speculative "burdens" on the NFL's commerce, even if accepted as legitimate, are "burdens" which can be caused by the City only as a market participant after acquisition by eminent domain. How the City enters the marketplace—by expenditure of public funds in the open market or by the condemnation process—should be held to be immaterial under the market participant doctrine.

The court below misinterpreted *White*, *Reeves*, and *Alexandria Scrap* in concluding that the exercise of governmental power to enter the marketplace permits dormant Commerce Clause review by the judiciary. To avoid this distortion of its precedents, this Court should review and reverse the judgment below.

## III

## EVEN IF THE CITY'S POTENTIAL ACTIONS FOLLOWING ACQUISITION OF THE RAIDERS' NFL FRANCHISE WERE DETERMINED TO BE BURDENS ON INTERSTATE COMMERCE, THEY WOULD BE INDIRECT AND INSUBSTANTIAL, AND NOT UNDUE BURDENS PROHIBITED BY THE COMMERCE CLAUSE

Even assuming that the judiciary may consider the dormant Commerce Clause in evaluating the City's exercise of its eminent domain power, the lower court misapplied Constitutional principles in concluding that the action imposed an impermissible

burden upon interstate commerce. Appendix 5a-8a. Burdens which are not direct and substantial burdens upon interstate commerce do not violate the Commerce Clause. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

In this case, the National Football League can eliminate any burden on its commerce caused by City acquisition of the franchise, simply by applying or amending the NFL constitution and by-laws. An analysis of the supposed burdens to be endured by the NFL as a result of this action demonstrates that all of the burdens found by the lower court are in fact controllable by the NFL itself.

The California court first held that "each League franchise owner has an important interest in the identity, personality, financial stability, commitment, and good faith of each other owner." Appendix 6a. The court, however, also noted the NFL's ability to eliminate any burden resulting from City acquisition: "Thus under League bylaws, new members must first be approved by the current members." (*Ibid.*) The City has been prepared to comply with any legal regulation of the NFL. In fact, the City has developed a possible plan for retransfer of the franchise to a profit-making entity which, according to NFL counsel, "would not run afoul of [NFL rules] as written." (RT 4954.)

The second "burden" perceived by the lower court was the potential adverse effect of the "new owner's allegiance to the local public interest" caused by the franchise being "permanently indentured to the local entity." Appendix 6a. Long-term commitments to communities of "at least" twenty to twenty-five years are common in the League. (RT 4905.) If long-term "indentures" to a local community are burdensome to the NFL, it may simply amend its rules to control the length of franchise commitment to location. In *Los Angeles Memorial Coliseum Commission v. National Football League*, 726 F.2d 1381 (9th Cir.), cert. denied, 105 S.Ct. 397 (1984), it was held that the federal antitrust laws, enacted by Congress under authority of the Commerce Clause, precluded NFL regulation of franchise location. If attempts by the NFL to control franchise location are violations of the federal antitrust laws, then, *ipso facto*, any City determinations of its own franchise's location cannot violate the Commerce

Clause. The Raiders' successful challenge of the NFL relocation requirements on antitrust grounds conflicts in principle with the lower court's "joint venture" characterization of the NFL. Appendix 6a. The anomaly of the lower court's decision is that it is the Raiders, not the City, who have "burdened" the League by moving to Los Angeles in violation of NFL rules. The City and the NFL want the Raiders in Oakland; the Raiders do not.

Another expressed concern of the lower court was that "the [NFL's] interests would be subordinated to, or at least compromised by, the new owner's allegiance to the local public interest in matters such as lease agreements, ticket prices, concessions, stadium amenities, scheduling conflicts, etc." Appendix 6a. Most NFL teams now have leases with publicly-owned stadiums which directly affect such matters. Here again, if NFL interests in such matters are adversely affected by City acquisition or operation, the NFL may alter its rules to remove such burdens.

Finally, the fear that "a single precedent of eminent domain acquisition would pervade the entire League, and even the threat of its exercise elsewhere would seriously disrupt the balance of economic bargaining on stadium leases throughout the nation" (Appendix 6a), is unwarranted. If governmental entities seek to acquire franchises by eminent domain, they must pay the price. That price is full fair market value. As in any eminent domain action, that value will represent whatever price the franchise could bring on the open market—and cannot illegally affect any existing or prospective business transactions of the franchise owners.

The foregoing reasons on which the California Court of Appeal relied were rejected in analogous circumstances by this Court in *Exxon Corporation v. Governor of Maryland*, 437 U.S. 117, 125-129 (1978). There, this Court considered a Commerce Clause challenge to a Maryland statute that required out-of-state producers and refiners of petroleum products to divest themselves of all company-operated retail service stations in Maryland, and held that the Commerce Clause does not protect or preserve any particular method of operation, but responds primarily to direct regulation, discrimination, or excessive taxation. 437 U.S. at 127. Exxon argued that because of the nationwide importance of

petroleum products and the possibility of other states enacting similar legislation, the Commerce Clause prohibited state regulation. This Court rejected Exxon's "novel suggestion" and held that in the absence of Congressional action, or a showing of a specific discrimination against, or undue burdening of, interstate commerce, the Court could not conclude that the States were without power to regulate in the area. 437 U.S. at 128-129.

The California court's decision also conflicts in principle with court decisions in three states which have considered Commerce Clause objections to eminent domain proceedings. Condemnation of interstate railroad property was upheld in Georgia (*Elberton Southern Railway Co. v. State Highway Dept.*, 211 Ga. 838, 841, 89 S.E.2d 645, 649-650 (1955)), in Illinois (*Western Union Telegraph Co. v. Louisville & Nashville Railroad Co.*, 270 Ill. 399, 415-423, 110 N.E. 583, 589-592 (1915), and in Texas (*Chicago, R.I. & G. Ry. Co. v. Tarrant County Water Control & Improvement Dist. No. 1* (Tex.Civ.App.) 76 S.W.2d 147 (1934), cert. denied, 295 U.S. 762 (1935)). All of these cases involved far more burdensome effects on interstate commerce than those identified by the California Court in the present case.

In *Elberton*, the railroad resisted condemnation for highway purposes of a strip of railway land. The railway company alleged that the acquisition "would seriously impair, if not completely destroy, its power to perform its public duty as a common carrier of interstate commerce." 211 Ga. at 840, 89 S.E.2d at 648-649. The Supreme Court of Georgia nevertheless held that demurrers were properly sustained to the railway company's allegations because they were "insufficient to show any undue interference with or burden upon interstate commerce." 211 Ga. at 841, 89 S.E.2d at 649-650.

In *Western Union Telegraph Co.*, the Supreme Court of Illinois held that the condemnation of a portion of property belonging to an interstate railway company did not violate the Commerce Clause. The state court held that the acquisition of property within Illinois under the State's sovereign power of eminent domain did not conflict with the history and purposes of the Commerce Clause. 270 Ill. at 415-423, 110 N.E. at 589-592.

In *Tarrant County*, a water district sought to condemn railway property being used in interstate commerce. The railway alleged that the state's power of eminent domain could not be exercised without approval of the federal government. The Texas court held that the "right of the state to exercise its power of eminent domain has not been surrendered to the federal government, even though interstate commerce may be indirectly or incidentally involved," and that federal approval was neither sought nor required. 76 S.W. 2d at 148.

State regulations which potentially would put an interstate carrier out of business have been upheld by this Court. In *Erie Railroad Co. v. Board of Public Utility Commissioners*, 254 U.S. 394 (1921), this Court approved an order of the New Jersey Public Utilities Commission requiring a railroad to make and pay for the cost of certain safety improvements. The railroad contended that compliance with the order would bankrupt it. This Court held that, "if the burdens imposed are so great that the road cannot be run at a profit it can stop, whatever the misfortune the stopping may produce." *Id.* at 411.

The "regulation" of interstate commerce described by the lower court is not direct; it is, at most, incidental and insubstantial. The City does not seek to regulate NFL activity, but instead seeks only to acquire an NFL franchise. Under *Pike v. Bruce Church, Inc.*, the indirect and incidental effects of acquisition, even if termed "regulation," cannot constitute an impermissible burden on interstate commerce.

## CONCLUSION

The California Court of Appeal held that the City of Oakland may not acquire the Raiders' NFL franchise by exercise of the State's sovereign power of eminent domain, solely because of the dormant powers of Congress under the Commerce Clause. The California court held that City acquisition of the franchise would unduly burden the commerce of the NFL, even though the NFL itself did not object to the acquisition. This decision conflicts in principle with decisions of this Court as well as with decisions of the Ninth Circuit and other State courts. The California court implicitly has extended this Court's ruling in *Garcia* beyond its reasonable limits, and has distorted the market participation doctrine established by this Court. Review and reversal of the California decision is necessary to prevent unwarranted attacks—based on dormant Commerce Clause grounds—on State and local government actions. The judgment of the California Court of Appeal should be reviewed and summarily reversed.

Dated: May 27, 1986.

Respectfully submitted,

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**Appendix A**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE CITY OF OAKLAND, a charter city and municipal corporation,
Plaintiff and Appellant,

v.

THE OAKLAND RAIDERS, et al.,
Defendants and Respondents.

A029031

(Monterey County
Sup.Ct. No. 76044)

Filed Nov. 15, 1985

Plaintiff City of Oakland appeals from a judgment after a court trial in favor of defendants Oakland Raiders, et al. We have determined that plaintiff's proposed exercise of eminent domain power would, in this case, violate the commerce clause of the United States Constitution. Accordingly, we affirm.

I

Facts and Procedure

Plaintiffs sued in 1980 to acquire by eminent domain the property of defendants Oakland Raiders (Raiders), a National Football League (NFL or League) franchise. The Alameda County Superior Court issued a preliminary injunction prohibiting transfer of the franchise from Oakland, the case was transferred to Monterey County (Code Civ. Proc., § 394), and summary judgment was entered for defendants. On appeal the Supreme Court reversed, holding our eminent domain statute allowed condemnation of intangible property and that plaintiff had a right to show whether its attempted exercise of eminent domain over the Raiders franchise would be a valid public use.

(*City of Oakland v. Oakland Raiders* (1982) 32 Cal.3d 60 [*Raiders I*].) We subsequently granted a peremptory writ of mandate directing the trial court to hold a hearing on plaintiff's application for reinstatement of the preliminary injunction against transfer of the franchise from Oakland. (*City of Oakland v. Superior Court* (1982) 136 Cal.App.3d 565 [*Raiders II*].) In the meantime, however, Raiders home games were played in Los Angeles. In early 1983 the trial court reinstated and modified the injunction against transfer, providing that all 1983 Raiders home games for the 1982 season would be played in Oakland "unless and until judgment after trial is entered in favor of [d]efendants before the beginning of the 1983 season." After trial in May 1983 the court entered judgment against plaintiff. Following various procedural maneuvers by plaintiff we issued an alternative writ of mandate, denied plaintiff's requested stay of judgment, and eventually issued a writ of mandate ordering the trial court to (i) vacate its judgment and (ii) proceed to determine those remaining objections to plaintiff's eminent domain action that it had not previously ruled on. (*City of Oakland v. Superior Court* (1983) 150 Cal.App.3d 267, 279-280 [*Raiders III*].)

On remand the court again entered judgment for defendants. Its decision is based primarily on three independent grounds: (1) that plaintiff's stated purpose is not a public use; (2) that plaintiff's action is invalid under federal antitrust law; and (3) that plaintiff's action is invalid under the commerce clause of the federal constitution.

## II
## Analysis

We turn first to the trial court's commerce clause determination. United States Constitution, article 1, section 8, clause 3, grants Congress the power "[t]o regulate commerce . . . among the several States . . . ." This provision was intended to foster development and maintenance of a national common market among the states and to eradicate trade barriers. (See, e.g., *Baldwin v. G.A.F. Seelig* (1935) 294 U.S. 511, 523 ["The Constitution was framed . . . upon the theory that the peoples of the several states must sink or swim together, and that in the long

run prosperity and salvation are in union and not division."]) Indeed, "[r]ecognition of [this] predominant goal . . . has premeated judicial interpretations of state power to regulate commerce." (Nowak, Rotunda & Young, Constitutional Law (2d ed. 1983) 267-268.)

It is today established that state or local regulation of interstate commerce will be upheld if it " 'regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental . . . unless the burden imposed on such commerce is clearly excessive in relation to putative local benefits.' " (*Edgar v. MITE Corp.* (1982) 457 U.S. 624, 640, quoting *Pike v. Bruce Church, Inc.* (1970) 397 U.S. 137, 142.) Still, "experience teaches that no single conceptual approach identifies all of the factors that may bear on a particular [commerce clause] case." (*Raymond Motor Transp., Inc.* v. *Rice* (1978) 434 U.S. 429, 440-441.) One additional, albeit less recently relied-on approach to review of state or local action under the commerce clause provides that burdens will be voided if the regulation governs "those phases of the national economy which, because of the need of national uniformity, demand their regulation, if any, be prescribed by a single authority." (*Southern Pacific* v. *Arizona* (1945) 325 U.S. 761, 767; see also *Edwards* v. *California* (1941) 314 U.S. 160, 176; *Minnesota Rate Cases* (1913) 230 U.S. 352, 399-400; *Leisy* v. *Hardin* (1890) 135 U.S. 100, 108-109; *Cooley* v. *Board of Wardens* (1852) 53 U.S. (12 How.) 299, 319.) The absence of Congressional action respecting such economic matters is not controlling because, as has been long established, the commerce clause limits state power by its own force. (*South Carolina State Highway Dept.* v. *Barnwell Bros.* (1937) 303 U.S. 177, 185-186; *Cooley* v. *Board of Wardens, supra*, 53 U.S. (12 How.) 299; see generally *Edgar* v. *MITE Corp., supra*, 457 U.S. 624, 640.)

Plaintiff claims, as a preliminary matter, that it cannot be subject to commerce clause review for three reasons. First, it asserts, such review is precluded by the law of the case doctrine—which generally binds all subsequent proceedings, trial or appellate, to prior appellate determinations in the same action—because defendants raised the commerce clause issue in

their petition for rehearing in *Raiders I*. Law of the case doctrine, however, does not extend to points of law that might have been but were not presented *and determined* on a prior appeal. (*DiGenova v. State Board of Education* (1962) 57 Cal.2d 167, 179, and cases cited.) Because the briefs in *Raiders I* contained nothing on the commerce clause issue and because denial of rehearing decides nothing on points raised for the first time in the rehearing petition (*County of Imperial v. McDougal* (1977) 19 Cal.3d 505, 513), law of the case did not preclude commerce clause review in the trial court.

Second, plaintiff asserts it is exempt from scrutiny under the commerce clause because it has merely attempted to enter the market as a participant, not a regulator. (See *South-Central Timber Development, Inc. v. Winnicke* (1984) ___ U.S. ___ [104 S.Ct. 2237, 2243]; *White v. Massachusetts Council of Const. Employers* (1983) 460 U.S. 204, 206-208; *Reeves, Inc. v. Stake* (1980) 447 U.S. 429, 436-437, 440; *Hughes v. Alexandria Scrap Corp.* (1976) 426 U.S. 794, 809-810.) Although plaintiff would escape commerce clause review if it had in fact acted as a mere market participant—i.e., if it had attempted to enter the football market on an equal footing, bidding with other potential market participants and seeking to purchase from someone willing and able to sell—it does not escape commerce clause review in this situation in which its action is grounded on its governmental power of eminent domain that it possesses as an agent of a sovereign, the State of California.[1] (Cf., *Reeves v. Stake, supra*, 447 U.S. 429, 437 [commerce clause applies to "actions taken by states in their sovereign capacity" but does not limit proprietary activity].) Here the city does not even cross the threshold of the marketplace except by first exercising what has been characterized as a sovereign's "most awsome grant of power"—eminent domain. (*Winger v. Aires* (1952) 371 Pa. 242, 244 [89 A.2d 521, 522].)

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[1] Cities, unlike states, lack inherent power to condemn. (*Raiders I, supra*, 32 Cal.3d at pp. 64-65; Comment, *Anticipating an Instant Replay: City of Oakland v. Oakland Raiders* (1984) 17 U.C. Davis L.Rev. 963, 976.)

Third, plaintiff contends exercise of eminent domain power can never violate the commerce clause and notes that no previous case has precluded an eminent domain taking under that constitutional provision. The lack of such case law, however, is unremarkable; it serves merely to point out that eminent domain cases have traditionally concerned real property, rarely implicating commerce clause considerations which deal primarily with products in the flow of interstate commerce. Whether the commerce clause precludes taking by eminent domain of intangible property, however, is a novel question posed, it seems, for the first time in this case.[2]

It is well established that a state may exercise eminent domain power even though by so doing it indirectly or incidentally burdens interstate commerce. (See *Elberton Southern Ry. Co. v. State Highway Dept.* (1955) 211 Ga. 838, 841 [89 S.E.2d 645, 649], and cases cited.) Defendants, however, contend that professional football is such a nationwide business and so completely involved in interestate commerce that acquisition of a franchise by an individual state through eminent domain would impermissibly burden interstate commerce. A recent Supreme Court decision, *Partee v. San Diego Chargers Football Co.* (1983) 34 Cal.3d 378, supports this view.

*Partee* held that the NFL required nationally uniform regulation and that interstate commerce would be unreasonably burdened if state antitrust laws applied to a League franchise located in this state. Uniform nationwide regulation was called for because "Professional football's teams are dependent upon the league playing schedule for competitive play. . . . The necessity of a nationwide league structure for the benefit of both teams and players for effective competition is evident as is the need for a nationally uniform set of rules governing the league structure. Fragmentation of the league structure on the basis of state lines would adversely affect the success of the competitive business

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[2] Contrary to plaintiff's urgings, nothing in *Hayfield Northern R. v. Chicago & N.W. Transp.* (1984) ___ U.S. ___ [104 S.Ct. 2610], persuades us that the eminent domain action here is exempt from commerce clause analysis.

enterprise, and differing state antitrust decisions if applied to the enterprise would likely compel all member teams to comply with the laws of the strictest state." (*Id.*, at pp. 384-385.)

The same situation is presented here. Indeed, the trial court's findings track and amplify on *Partee*. Regarding the interdependent character of the NFL, the court noted that each team is substantially dependent for its income on every other team: League television contract proceeds are divided equally and gate receipts nearly equally; a team's drawing power is therefore a financial benefit to the other teams as well as to itself; hence the capacity and quality of the facility in which games are played is a component of the League's financial success. The court also found evidence of the necessity of a nationwide League structure: based on the above factors, each League franchise owner has an important interest in the identity, personality, financial stability, commitment, and good faith of each other owner. Thus, under League bylaws, new members must first be approved by the current members. In short, although the clubs compete to an important degree, the League is also a joint venture of its members organized for the purpose of providing entertainment nationwide. Finally, the court found that a bar to relocation on the basis of state eminent domain law would adversely affect the League enterprise. An involuntarily acquired franchise could, at the local government's pleasure, be permanently indentured to the local entity. The League's interests would be subordinated to, or at least compromised by, the new owner's allegiance to the local public interest in matters such as lease agreements, ticket prices, concessions, stadium amenities, scheduling conflicts, etc. As the trial court found, it must also be anticipated that a single precedent of eminent domain acquisition would pervade the entire League, and even the threat of its exercise elsewhere would seriously disrupt the balance of economic bargaining on stadium leases throughout the nation.

Plaintiff's proposed action would more than indirectly or incidentally regulate interstate commerce: plaintiff claims authority—pursuant to authorization found in state eminent domain statutes—to bar indefinitely defendant's business from relocating out of Oakland. This is the precise brand of parochial meddling

with the national economy that the commerce clause was designed to prohibit.

As shown above, relocation of the Raiders would implicate the welfare not only of the individual team franchise, but of the entire League. The spectre of such local action throughout the state or across the country demonstrates the need for uniform, national regulation. In these circumstances (and apart from other potential bases of commerce clause violation[3], if relocation threatens disproportionate harm to a local entity, regulation—if necessary—should come from Congress;[4] only then can the consequences to interstate commerce be assessed and a proper balance struck to consider and serve the various interests involved in a

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[3] It might be argued that plaintiff's attempted exercise of eminent domain would be analogous to a local embargo or prohibition of outgoing commerce—a practice frequently designated a per se violation of the commerce clause. (Nowak, Rotunda & Young, *supra*, pp. 284, 286-287; see also Note (1983) 4 Pace L.Rev. 169, 191-192 [eminent domain acquisition of the Raiders would impermissibly burden interstate commerce by reducing the number of businesses that pass through such commerce].) The trial court touched on a similar point when it stated, "it would seem essential to the welfare of any business in a free enterprise system that it be substantially free to relocate to a better economic environment to maintain or enhance its viability." (Cf., *Nash* v. *City of Santa Monica* (1984) 37 Cal.3d 97, 111-121, and cases cited (Mosk J., dissenting) [discussing an individual's right to go out of business]; *Pike* v. *Bruce Church, Inc.*, *supra*, 397 U.S. 137, 145 ["the Court has viewed with particular suspicion state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere"].) Whether such a broadly stated proposition may ultimately prove correct, however, need not be decided here. We are not faced with the question of whether, consistent with the commerce clause, a local government may prevent relocation of a business that, although producing goods that eventually flow in interstate commerce, is not an interdependent component part of an interstate joint venture such as the NFL.

[4] Note, *The Constitutionality of Taking a Sports Franchise by Eminent Domain and the Need for Federal Legislation to Restrict Franchise Relocation* (1985) 13 Fordham Urban L.J. 553.

uniform manner. (*Partee v. San Diego Chargers Football Co., supra,* 34 Cal.3d 378, 385.)

Our supreme court in *Partee* held this state's legitimate interest in enforcing our own antitrust laws against a League franchise was outweighed by the burden such enforcement would impose on interstate commerce. Plaintiff here does not seek to promote the health or safety of its citizens, or even, as in *Partee,* promote fair economic competition. Instead it seeks to act for what may be presumed, for purposes of analysis, to be legitimate, but less compelling reasons: to promote public recreation, social welfare, and to secure related economic benefits, as well as to best utilize the stadium in which the Raiders played.

We conclude, as did *Partee* in a similar context, that the burden that would be imposed on interstate commerce outweighs the local interest in exercising statutory eminent domain authority over the Raiders franchise.

Our conclusion on the commerce clause obviates the need for further consideration of the public use and antitrust arguments.

Judgment is affirmed.
CERTIFIED FOR PUBLICATION.

Sabraw, J.

WE CONCUR:

Anderson, P.J.

Channell, J.

**Appendix B**

Order Denying Review
After Judgment by the Court of Appeal
1st District, Division 4, No. AO29031
In the Supreme Court of the State of California
[Filed Feb. 27, 1986]

IN BANK

THE CITY OF OAKLAND

v.

THE OAKLAND RAIDERS, et al.

Broussard, J. and Panelli, J., did not participate

Appellant's petition for review DENIED.

Reynoso, J., is of the opinion the petition should be granted.

Bird
Chief Justice